

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA

IN RE: . Case No. 08-35653(KRH)
CIRCUIT CITY STORES, INC., .
Debtor. . 701 East Broad Street
 . Richmond, VA 23219
 .
 . March 3, 2009
 . 10:05 a.m.

TRANSCRIPT OF HEARING
BEFORE HONORABLE KEVIN R. HUENNEKENS
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

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1 THE CLERK: In the matter of Circuit City Stores,
2 Inc. hearings on Items 1 through 30 as set out on debtor's
3 amended agenda.

4 MR. FOLEY: Good morning, Your Honor. Doug Foley on
5 behalf of the debtors. With me at counsel table is Dan Blanks
6 with McGuire Woods for Circuit City.

7 THE COURT: Good morning, Mr. Foley.

8 MR. FOLEY: We have 30 items on the agenda this
9 morning, Your Honor, but I believe it will be relatively brief.
10 The weather has certainly helped with resolving things and
11 people not wanting to have to travel to be here today. If we
12 could just go through the items quickly, Your Honor, on the
13 agenda.

14 Item Number 1 is the Graystone complaint that had
15 been previously filed with respect to certain alleged
16 constructive trust funds under insurance policies that we had
17 with Federal Warranty. They have withdrawn that complaint so
18 it can be stricken from the docket, Your Honor.

19 THE COURT: All right. It will be withdrawn.

20 MR. FOLEY: Your Honor, Items Number 2, 3 and 4, the
21 National Retail Property, the Holy Oak Crossings LP and the
22 Columbia Plaza matters were all requests for timely payment of
23 lease obligations under 365(d)(3). We have resolved the
24 matters with all of those landlord parties and have paid them.
25 So those matters can be removed from the docket.

1 THE COURT: All right.

2 MR. FOLEY: Your Honor, Item Number 5 similarly is
3 the MDS Realty Two matter. Again, this is a request for
4 payments of certain amounts owed post-petition. We've
5 reconciled the amounts and have paid the amounts due, and that
6 matter can also be removed from the docket.

7 THE COURT: All right.

8 MR. FOLEY: Your Honor, Item Number 6 is our motion
9 for sell down procedures for trading and equities, securities
10 and claims. We are still working with the committee on
11 language for the form of an order that we may submit with
12 respect to that and we've agreed with the committee to adjourn
13 that matter once again to the March 30th omnibus hearing date.

14 THE COURT: All right, very good.

15 MR. FOLEY: Your Honor, Item Number 7 --

16 THE COURT: Has the response of the Securities and
17 Exchange Commission been resolved with regard to that issue?

18 MR. FOLEY: Yes, Your Honor, I believe it has been
19 resolved.

20 THE COURT: Thank you.

21 MR. FOLEY: Your Honor, with respect to Item Number
22 7, this was our initial motion to reject certain leases and
23 subleases that was filed in November. There were some
24 responses that we had carried over several months from some
25 sub-landlord -- or sub-tenants. Mr. Schwartzchild (phonetic)

1 represents several of them.

2 We believe we have resolved the date of rejection
3 with respect to those subleases which will likely be the end of
4 November, and we're going to work with Mr. Schwartzchild on
5 trying to get a stipulation that deals with the rejection date
6 but then preserves any issues relating to any claims those
7 sub-tenants may have with respect to any workout or work around
8 arrangement they dealt with, with the other landlord, whether
9 they had to pay more rent or pay double rent. All claim issues
10 will be reserved.

11 We are working on that stipulation but he has
12 requested and we've agreed to adjourn once again these matters
13 until the March 30th omnibus hearing date. But, we hope to
14 submit a stipulation before that.

15 THE COURT: All right. Very good, it will be
16 continued to March 30.

17 MR. FOLEY: Your Honor, the Item Number 8 is the
18 TomTom matter motion for relief from stay to do setoff and
19 recoupment with respect to certain credits and amounts back and
20 forth that are owed. We are in the process of -- we have a
21 stipulation drafted, but the numbers have not yet been
22 reconciled. We are trying to reconcile the credits with the
23 503(b)(9) claim. We hope that we are going to be able to also
24 get that one submitted before the March 30th omnibus hearing
25 date, but until then TomTom has agreed and requested that we
26 carry their motion over to the March 30th date.

1 THE COURT: It will be adjourned until March 30.

2 MR. FOLEY: Your Honor, Items Number 9 and 10, these
3 are the Motorola matter and the General Instrument matter.
4 These are 503(b)(9) requests for payment of administrative
5 claims. They have both requested, and we have agreed to
6 adjourn these two matters, 9 and 10, until the April 14th
7 omnibus hearing date, Your Honor.

8 We are in the process of reconciling 503(b)(9) claims
9 right now including filing some objections and we will probably
10 be asking the Court to set an administrative bar date, as well,
11 coming up in the next 60 days or so. So, they've requested to
12 just put these off until the April omnibus date.

13 THE COURT: All right. Very good, they will be
14 continued to April 14.

15 MR. FOLEY: Your Honor, Item Number 11. This is our
16 motion with respect to IBM to approve a settlement under 9019.
17 The issue here, Your Honor, they've requested, and so has the
18 committee, that we adjourn this matter until the April 14th
19 omnibus hearing date. The issue that we're trying to work
20 through is pending a sale of the debtor's intellectual property
21 assets which may have an affect on the IBM claim, the IBM
22 settlement, until that gets resolved, they do not want to go
23 forward with seeking formal Court approval of the 9019
24 settlement motion yet. So, that's the basis for the request to
25 carry this matter over to the April 14th docket, Your Honor.

26 THE COURT: All right. Then it will be continued to

1 April 14.

2 MR. FOLEY: Your Honor, two matters that are not --
3 that are related, but aren't in order on the docket, are Items
4 Number 12 and Item Number 16. These are the two motions by
5 Plum Choice, one for relief from stay and one for payment of
6 administrative claim.

7 THE COURT: I thought you said last time we were here
8 that those two items were resolved?

9 MR. FOLEY: They are resolved in principle. The only
10 thing that we are trying to do now is reconcile about \$200,000
11 worth of administrative claim. And we would have had that
12 resolved yesterday, but the relevant business people of the
13 client were out of the office yesterday because of the weather
14 in Richmond and snow, so we weren't able to get that last piece
15 reconciled.

16 But, as soon as that is done, we do have an agreement
17 in principle. We just need to figure out the exact amount that
18 we're going to pay them as part of the settlement.

19 THE COURT: All right.

20 MR. FOLEY: So, we will submit a stipulation, Your
21 Honor, on that. We've requested -- they've requested and
22 agreed because we want to keep the urgency to get this one
23 resolved, although the March 13th hearing date is really only
24 for leases, and we will have some leases sales going forward
25 because we did get some bids yesterday, so there will be a

1 hearing on the 13th of March, we would ask that Items Number 12
2 and Items Number 16, the Plum Choice matters, be adjourned only
3 to the March 13th hearing date, again with the hopes that we
4 will be submitting a stipulation before then so that they won't
5 be on the docket.

6 THE COURT: All right. Items Number 12 and 16 will
7 be continued to March 13th.

8 MR. FOLEY: Thirteenth, thank you, Your Honor. Items
9 Number 13 and 14, these are the AOL motion and the Platform A
10 motion for payment of administrative claims. We are
11 reconciling the numbers with respect to their claims and
12 hopefully we will resolve those soon. They have agreed and
13 requested an adjournment of their motions until the March 30th
14 omnibus hearing date.

15 THE COURT: All right. That will be granted. Both
16 of those matters will be continued to March 30.

17 MR. FOLEY: Your Honor, Item Number 15 is the Federal
18 Warranty motion to compel assumption or rejection. As we
19 reported last time we were here, we had a meet and confer in
20 person with Federal Warranty and their counsel here in Richmond
21 on the 26th of February. And as a result of that, we met most
22 of the afternoon with them, not only do we think we are heading
23 toward a complete resolution of this particular motion, but
24 there are ancillary issues and claims relating to a fund that
25 the debtors may have some rights to in the millions of dollars

1 range that we are hoping to have a global settlement on this
2 but we need some time to document it. So, Federal Warranty has
3 agreed to adjourn this matter to the March 30th hearing date.

4 THE COURT: All right. That will be continued to
5 March 30.

6 MR. FOLEY: Your Honor, the Item Number 17, this is
7 Congressional North Associates Limited Partners' motion. We
8 are again trying to work through the reconciliation of the
9 amounts that they allege, and given the timing of when we may
10 reject that lease and any claims that may accrue up until
11 rejection, they've requested that we adjourn their matter to
12 the April 28th omnibus hearing date so that we can deal with
13 all their claims issues at the same time.

14 THE COURT: April 28. That will be continued to
15 April 28.

16 MR. FOLEY: Thank you, Your Honor. Item Number 18 is
17 the GMS Golden Valley Ranch motion. Your Honor, again we are
18 trying to reconcile the amounts that they are owed with respect
19 to their lease and they've requested an adjournment and we've
20 agreed to the March 30th hearing date, Your Honor.

21 THE COURT: All right. That matter will be continued
22 to March 30.

23 MR. FOLEY: Your Honor, Item Number 19 again is our
24 motion for lease bidding procedures and we did receive some
25 bids yesterday so we're simply asking that this matter be held

1 actually on the March 13th hearing date.

2 THE COURT: All right. So, that will be continued to
3 March 13.

4 MR. FOLEY: Your Honor, Item Number 20 is the Applied
5 Predicted Technologies' request for administrative claim.
6 Again, our client is working on reconciling the numbers that
7 they've alleged that are owed and they've requested and we've
8 agreed to adjourn the matter to the March 30th hearing date.

9 THE COURT: All right. That will be continued to
10 March 30.

11 MR. FOLEY: Your Honor, Item Number 21 is the Polaris
12 matter and we've been in discussions with counsel for Polaris,
13 and this one also has a wrinkle to it that it may resolve
14 itself or the issues may crystalize depending on the timing of
15 rejection of the lease. They've requested similarly as the
16 previous matter for Congressional North Associates that this be
17 adjourned until the April 28th hearing date.

18 We've agreed with them as the docket reflects that
19 they can file an amended motion by April 14th which will
20 hopefully reflect whatever issues transpire with respect to
21 rejection between now and then. And we will file a
22 supplemental response by the April 24th date, and hopefully
23 have this matter resolved or heard on the April 28th hearing
24 docket.

25 THE COURT: All right. That item number will be

1 continued to April 28.

2 MR. FOLEY: Your Honor, Item Number 22, this is the
3 motion for relief from the automatic stay by Direct TV. We
4 request that this matter be carried over to the March 30th
5 hearing date. However, we are in the process of, we believe,
6 resolving this matter through the return of goods under the
7 Court's existing reclamation procedures order. And the issues
8 that we have with Direct TV, if enough of product gets returned
9 to them during this time frame, their pre-petition claim will
10 essentially be satisfied which would alleviate the need for a
11 setoff or recoupment and they would pay us the amount that they
12 owe us. So we hope this matter will just simply sort itself
13 out in the next month. That's why we ask the Court to carry it
14 over to the March 30th date.

15 THE COURT: All right. So it will be continued to
16 March 30.

17 MR. FOLEY: Your Honor, Item Number 23 on the docket.
18 This was a matter that we reported to the Court at the last
19 hearing that we may need a Court order on depending on whether
20 the committee consented to the alternative form of sale that we
21 conducted through the auction that was -- we had the transcript
22 that was submitted into evidence at the last hearing.

23 The Unsecured Creditors' Committee has consented to
24 that form. The purchaser, and the committee and the debtors
25 have worked with respect to having the sale notice filed today

1 and I believe the purchaser and the committee prefer to have a
2 -- I don't want to call it a comfort order, but sort of a belt
3 and suspenders order that approves the form and certain tweaks
4 to the sale procedure that we have negotiated with them.

5 So, this afternoon we may be in a position to be
6 BOPSing an order to Your Honor that would have to be, if Your
7 Honor is available this afternoon, to be entered today.

8 THE COURT: Well, I will certainly be here today, but
9 the earlier you can get me the order, the better.

10 MR. FOLEY: Thank you, Your Honor. We will try to
11 have something by one or two o'clock at the very latest.

12 THE COURT: All right. Then I can certainly get it
13 entered today if I get it in that time frame.

14 MR. FOLEY: Okay. Thank you, Your Honor. Your
15 Honor, Item Number 24. This is our motion to sell certain real
16 property in Phoenix, Arizona. And we set it up with a stalking
17 horse bidder, but there is no expense reimbursement or breakup
18 fee associated with the stalking horse bid. There is a due
19 diligence out by this bidder that they can exercise until
20 tomorrow. We don't know if they will or not.

21 But, we intend to go forward even if the stalking
22 horse bidder exercises their due diligence out to go forward
23 with an auction in any event. There's been no other responses
24 to the motion so we would ask the Court to grant this
25 particular procedures motion.

1 THE COURT: All right. That I am granting.

2 MR. FOLEY: Thank you, Your Honor. Your Honor, Item
3 Number 25 again is our fourth omnibus motion to reject certain
4 leases and we have not received any responses. I don't believe
5 there is any counsel that needs -- wants to address the Court,
6 we would ask the Court to grant that motion.

7 THE COURT: Any party wish to be heard in connection
8 with Item Number 25 on the docket?

9 All right, that motion will be granted.

10 MR. FOLEY: Your Honor, Item Number 26 is our motion
11 to extend the exclusive periods to file a plan and solicit
12 acceptance to a plan. We've worked with the committee on
13 discussing the appropriate time frames and there has been no
14 objection to this particular motion. If the Court grants the
15 motion, the period by which the debtors will have to file a
16 plan for liquidation will be July 8th and the time period for
17 solicitation will be extended to September 6th. And I don't
18 believe there's been any responses, Your Honor. We would ask
19 the Court to grant that motion, as well.

20 THE COURT: Any party wish to be heard on the
21 debtor's motion to extend the exclusive periods?

22 All right. That motion will be granted.

23 MR. FOLEY: Thank you, Your Honor. Item Number 27 is
24 our motion, Your Honor, with respect to certain IBM point of
25 sale equipment, personal property leases that we are seeking to

1 reject. There are essentially two master leases with multiple
2 schedules, depending on what equipment is in what stores and
3 distribution centers. We've made a couple of tweaks to the
4 order simply to allow IBM to file a unitary proof of claim with
5 respect to the various rejections of the leased equipment.

6 They did not contest our view that this lease was --
7 these master leases were severable based upon the schedules.
8 So, the property is essentially being taken out of the
9 locations as we finish with them. Again, this is point of sale
10 equipment in the various stores. So, with that, Your Honor, we
11 ask -- we'd like to submit an order. We don't believe there
12 has been any opposition to this motion. We'd like the Court to
13 grant it.

14 THE COURT: Any party wish to be heard in connection
15 with Item Number 27?

16 Okay, that motion will be granted.

17 MR. FOLEY: Your Honor, Item Number 28 is the DL
18 Peterson motion and counsel for the movant is here. We have
19 agreed to a stipulation and consent order resolving the motion
20 that we will be submitting later today. It provides for the
21 payment of various amounts that are due under the lease. And
22 it also provides a mechanism by which the business people can
23 consult with one another. The issue here, Your Honor, is we
24 have certain batteries in forklifts that are owned and leased.
25 Sometimes the leased batteries are in the owed forklifts or the

1 owned batteries are in the leased forklifts, and we need -- in
2 the distribution center, so this provides mechanism whereby the
3 parties can sort out what goes where. And we've -- again,
4 we've resolved it and we'd like to submit the stipulation this
5 afternoon.

6 THE COURT: This was the issue with -- they were
7 contending that you were selling some of their equipment and so
8 the equipment that was at issue were batteries that were
9 located in property that the debtor owned.

10 MR. FOLEY: Exactly, Your Honor. We've agreed
11 obviously in the stipulation that we will not sell their
12 property and over the next seven days we're going to work
13 through trying to sort out getting the right batteries into the
14 right places.

15 THE COURT: All right. Very good.

16 MR. KOBBE: Good morning, Your Honor. Kevin Kobbe on
17 behalf of the movant. The batteries are one component of what
18 we're dealing with here. We've also got vehicles and we've got
19 forklifts, as well. And so, happily we have resolved the
20 issues with respect to the vehicles and the lifts, it's just
21 the batteries, the smallest component, that we're still working
22 on.

23 THE COURT: All right. Very good.

24 MR. KOBBE: Thank you, Your Honor.

25 THE COURT: All right. So, I'll look for that

1 stipulation.

2 MR. FOLEY: Thank you, Your Honor. Your Honor, Items
3 Number 29 and 30. If we could take 30 first because I believe
4 that's been partially resolved. Your Honor, that's the --
5 that's Mr. McCullagh's motion. Your Honor, this involves both
6 a request to compel payment of certain taxes, as well as
7 attorneys' fees. We've agreed to pay the taxes for a portion
8 of the request and carry over the issue of whether or not the
9 attorneys' fees are appropriately payable until the March 30th
10 hearing date, provided we get some backup support for the
11 amounts that are allegedly incurred by March 20th. I believe
12 that is the resolution.

13 MR. McCULLAGH: That is accurate, Your Honor. Neil
14 McCullagh for the movant Dentici Family Limited Partnership.

15 THE COURT: All right. So, it's been resolved with
16 regard to the rent issue and then the attorneys' fee issue will
17 be carried over to March 30.

18 MR. FOLEY: Yes, Your Honor. The issue that we
19 resolved was the taxes. We will pay the taxes.

20 THE COURT: The taxes.

21 MR. FOLEY: Your Honor, I believe that leaves the
22 Cole CC Taunton matter. I don't know if there is anything left
23 to go forward on that, but counsel is here. I'll have --

24 THE COURT: All right. Very good.

25 MS. PIERRO: Good morning, Your Honor. Kimberly

1 Pierro on behalf of the various Cole Capital Partners, the
2 landlords, I believe that they are referred to as the Cole
3 Landlords in the motion, representing the premises located in
4 Taunton, Aurora, Mesquite and Groveland. And this motion is
5 seeking adequate --

6 THE COURT: Is this one lease that covers these four
7 locations, or are they four separate leases?

8 MS. PIERRO: They are four separate leases, Your
9 Honor.

10 THE COURT: Okay.

11 MS. PIERRO: The relief breaks down into separate
12 types. I know that the debtor's response has referenced
13 certain payments that have been made since the filing of this
14 motion. I'd like to just briefly address those.

15 The first, with regard to the Cole Taunton third
16 quarter 2008 taxes, the debtors have indicated that payments, I
17 believe, have been made for January and February. These came
18 due February 1st, I believe, and have indicated that they will
19 pay a certain amount per day for however long they are in the
20 premises from March.

21 THE COURT: And this is the taxes, right?

22 MS. PIERRO: This is -- yes, these are the taxes.
23 I'm referring specifically to Paragraph A of the motion, Cole's
24 motion requesting relief. So, with regard to the Cole Taunton
25 third quarter 2008 taxes, as I said, the debtors have indicated

1 that they have paid January and February and will pay March for
2 the number of days that they are in the store for March, which
3 is undetermined at this point as they are finalizing the
4 liquidation process. And what Cole Taunton would request is
5 some sort of assurance of that March payment for taxes.

6 We don't -- it's not indicated in the debtor's motion
7 whether this would be amounts that would be escrowed or exactly
8 how that would be set aside for payment of however many days.
9 So, with regard to that, that seems to be mostly resolved with
10 the exception of some sort of assurance of how exactly is that
11 money being set aside for payment of however many days they are
12 in March -- they are there in March.

13 With regard to the Cole Mesquite --

14 THE COURT: The issue though being the obligation of
15 the debtors under 365(d)(3) to timely perform their obligation
16 under that lease. So, it would be payable whenever the lease
17 would say it was due, which I assume is at the end of the
18 month?

19 MS. PIERRO: For Cole Taunton these are due at the
20 end of the month, but as I am working from what the debtors
21 have indicated that they will promise to do is pay as many days
22 as they are in. I believe the debtors have objected to paying
23 through the 31st of March saying that they are likely not going
24 to be there to that point. And the issue that we have with
25 their proposal as set forth in their answer to the motion as to

1 here's a pro rata daily rate for the taxes in March and we will
2 pay as many of those pro rata days as we are there is just --
3 we don't understand where -- if that is going to be money that
4 is specifically set aside in an escrow account, if it will be
5 paid over March so a little more clarity on that. And I think
6 that would likely resolve the issue, but we would want some
7 sort of clarity.

8 THE COURT: How about with regard to the March taxes
9 that we carry that over to March 30 and then by that time you
10 can see whether or not you've been paid or how many days the
11 debtor has been there and we can actually have an answer?

12 MS. PIERRO: So, carry that portion of the third
13 quarter?

14 THE COURT: The March tax issue with regard to Cole
15 Taunton to March 30 date.

16 MS. PIERRO: Okay. And the next issue, and I'm
17 skipping down to our request for relief C regarding the Cole
18 Mesquite taxes for the post-petition 2008 taxes that came due.
19 Again, the debtors in their response have referenced a payment
20 made in December. So, I think at issue is really the amounts
21 for November 10th through November 30th.

22 THE COURT: The stub rent period.

23 MS. PIERRO: And that is how it is being
24 characterized in -- by the debtors. However, this tax bill
25 came due in the post-petition period. So, the Mesquite -- it

1 is correct that this particularly -- that's why it is important
2 to know that these were four separate leases -- the Mesquite
3 lease is one that is -- it was a pay in advance lease.
4 However, the tax bill came due post-petition. So, it is Cole's
5 position that that November 10th, November 30th portion of the
6 taxes would be due and is not part of the stub rent issue.

7 In other words, the tax bill came due. The debtors
8 paid December and -- but the tax bill came due for November as
9 well and, of course, Cole would want to prorate that for the
10 10th through the 30th of November. But, it's Cole's position
11 that that is not so much a stub rent issue as it is, again, the
12 tax bill came due post-petition.

13 So, therefore, it is a post-petition obligation that
14 came due and it needs to be paid by the debtors, with regard
15 to, like I said, that one Mesquite portion.

16 THE COURT: What does the lease say?

17 MS. PIERRO: As far as what's due when -- when it's
18 due? Let's see. It's -- the lease says that the tenant shall
19 pay the real estate taxes within 30 days of tenant's receipt of
20 landlord's statement, accompanied by the tax bill. So, it
21 indicates a payment by the debtor when the tax bill is received
22 which was received post-petition. And, as I said, I don't
23 think there is any question on Cole's part that anything prior
24 to November 10th would not be part of that, but that November
25 portion would be due and payable now as a current post-petition

1 obligation.

2 THE COURT: Okay.

3 MS. PIERRO: Then the remainder of the relief
4 requested by Cole is really in the form of adequate protection
5 that there are 2009 taxes that are going to be due well after
6 the debtor is no longer in business. I don't think that there
7 is any question about that. They are currently liquidating and
8 the real concern that Cole has is that the real property taxes
9 operate as a lien and will remain a lien if unpaid.

10 Whereas, the debtor is incurring the benefit of use
11 and possession of the leased properties to conduct the
12 remainder of the liquidating sales, and that there is really no
13 assurance that there is going to be money available to pay the
14 portions of real estate taxes that are currently operating as a
15 lien. So, you've got a creditor with -- or a landlord with
16 increasingly encumbered property and the debtor enjoying the
17 use of that property and needing the use of that property.

18 And there is no tax bill yet. There won't be until
19 2010 likely. At the beginning of the year, we'll know what the
20 2009 taxes are. But, there is no assurance that even if these
21 are couched as administrative claims that they will be paid
22 given the posture of the case and where the case currently
23 stands. So, what the Cole Landlords are requesting is some
24 form of adequate protection for payment of those taxes and have
25 suggested a pro rata monthly payment using 2008 as a guide.

1 So, we're not looking -- it's not so much a prepayment of taxes
2 that is not accrued, it is some type of assurance that the
3 money is going to be available to pay off these liens that are
4 on the properties.

5 THE COURT: Does the lease require that they prorate
6 the payment of taxes over the monthly period?

7 MS. PIERRO: There's no requirement in the lease for
8 this. This is really couched as protection of the landlord for
9 liens that are being -- that are attached to the property in
10 the event that there isn't money to pay even administrative
11 claims in the case.

12 And what's happening is, the debtor is using the
13 benefit of the property and if there isn't enough for any --
14 for all of the administrative claims after the liquidation,
15 after all is said and done, then the landlord is left with a
16 lien against his property and would have to shoulder that
17 burden. And that's not something that the landlord needs to
18 shoulder as much as the debtor needs to provide adequate
19 protection for use of the property. And we're suggesting that
20 this is one form that that adequate protection can take.

21 I believe that the debtors have gone back and forth
22 in the alternative and talked about administrative expense
23 claims. And I think that that is couched as another
24 alternative for adequate protection. It could be an
25 administrative expense claim and that could be the type of

1 protection that could be used. But, that is -- Cole would
2 request something more than that in the chance that the
3 liquidation just doesn't -- isn't able to fund all of the
4 administrative claims against the estate.

5 THE COURT: Isn't it a bit premature though at this
6 point? I mean, because we don't know whether your leases are
7 going to be assumed and assigned through the sale process that
8 the debtor has got in place right now, or whether ultimately it
9 is going to be rejected.

10 And if it is assumed, obviously they are going to
11 have to cure and that would be part of your cure amount. If
12 it's rejected, then you'd be entitled to file the lease
13 rejection damages claim, a portion of it which would be
14 entitled to perhaps administrative priority for these taxes
15 that you are talking about, and isn't that the procedure that
16 we would do? And, I guess, we might even have to have an
17 estimation hearing or something about the amount of your claim.
18 But, I'm just trying to figure out why we'd decide this right
19 now.

20 MS. PIERRO: I think, one, I believe the -- I want to
21 say the Groveland lease that debtors have indicated are not
22 part of the bidding. One of the leases is not part of the
23 bidding process currently so there are -- the other leases, I
24 believe, are involved in the process you've discussed and I
25 believe the auction on that is March 10th. And that all is a

1 possibility and I think it's precisely the uncertainty that
2 shakes the landlords right now is whether -- we don't know if
3 these are going to be bid, and historically speaking there
4 hasn't been a lot of success in that process.

5 So, we don't -- so the landlords are left with a lot
6 of uncertainty with these liens that are currently in place.
7 And again, there is a possibility if it is rejected, then there
8 would be an administrative claim. But, at the same time, there
9 is an issue of whether or not that actually is going to resolve
10 the matter and that there would be funding available. And by
11 the time we realize that funding may not be available for all
12 of the administrative claims, it just may be too late.

13 So, the Cole Landlords wanted to act now and put it
14 out there saying, we need some sort of protection for these
15 liens, for payment of these liens that are on the leased
16 property for the use that you are getting for at least the
17 first three months of the year, and that's really what is
18 making them nervous, making them need to request from the Court
19 adequate protection of their interest at this point. There is
20 a lot of uncertainty with this case, a whole lot can happen.

21 THE COURT: Let's assume -- and I think I understand
22 what you are saying. You are concerned that if you file an
23 administrative claim and it's allowed, then that might not be
24 sufficient monies to pay the administrative claim in full.

25 MS. PIERRO: Right, that is correct.

1 THE COURT: All right. And so if I fashion some sort
2 of relief now then you wouldn't have to face that uncertainty.

3 MS. PIERRO: And it's the uncertainty that we're
4 guarding against, and that's the point of the adequate
5 protection.

6 THE COURT: Wouldn't that be granting you a super
7 priority of some sort with regard to your administrative
8 status? Because even if I was to grant you the relief that you
9 are asking for and the same scenario came down where there
10 wasn't enough money to pay all administrative claims, your
11 claim would be subject to disgorgement, wouldn't it?

12 MS. PIERRO: Well, I think that it is not so much
13 payment on a claim. It's some sort of form of protection. And
14 as I said that form can -- it can take -- adequate protection
15 in this instance can take many forms. Ideally, Cole would like
16 some sort of immediate payment and that's what we're
17 requesting. But, if that form comes in, the form of some sort
18 of administrative claim, then perhaps that is the solution.
19 But, what they are asking for is relief to the extent that the
20 portion of these tax liens would be reimbursed for the benefit
21 that the debtor is receiving from conducting these store
22 closing sales for this first three months of the year.

23 So, it's not so much a super priority of an
24 administrative claim, as much as it is something to relieve the
25 uncertainty that is just inherent in the situation.

1 THE COURT: All right. Thank you. Let me hear from
2 Mr. Foley.

3 MR. FOLEY: Your Honor, with respect to the issue of
4 the taxes for the stub, the stub taxes for November, as Your
5 Honor is aware the Court has adopted the accrual method in this
6 case, not the billing date approach. Our view is there is no
7 distinction between the taxes which are an additional rent
8 obligation. We are not directly liable for the taxes. It's a
9 pass-through obligation on a lease as additional rent.

10 So, we've adopted the proration approach. We've been
11 following that. We are treating the November stub taxes the
12 same as the November stub rent which is tied up on the appeal
13 that's proceeding hopefully directly to the Fourth Circuit.
14 Your Honor, there is no dispute that we've paid December, we've
15 paid January, we've paid February. We'll pay March when the
16 taxes accrue and are due. That's when we'll pay them under
17 365(d)(3) which is the remedy that landlords have. The issue
18 about --

19 THE COURT: So, you are saying that those taxes were
20 -- although they accrued in November, they were actually due
21 pre-petition under the terms of the lease?

22 MR. FOLEY: Yes, Your Honor, because it is a November
23 -- it would be a paid in advance lease, it's not a paid in
24 arrears lease. There are some landlords that have paid in
25 arrears leases where all the obligations are paid -- become due

1 at the end of the month. This was a paid in advance lease.

2 With respect to the request for adequate protection,
3 again, I think this is just a -- it's a novel argument, but I
4 don't believe there is any legal support for 363(e) applying to
5 landlords under 365. I mean, there is certain provisions in
6 the code about personal property leases, but this is
7 essentially a request for us to pay in advance or escrow in
8 advance funds for particular landlords for unaccrued and undue
9 taxes. There is no reason to carve out these landlords for the
10 super priority, as Your Honor called it. So, we would ask that
11 that relief be denied.

12 Once we get to March 30th we will know with respect
13 to all of these leases when they were rejected, when we vacated
14 and what our obligation is to pay through what date. And,
15 again, we've paid everything for December, January, February,
16 March, so I just think this is a little too much nervousness on
17 behalf of the landlord and would request that the Court deny
18 the relief that they are requesting.

19 THE COURT: All right. Thank you. Any other party
20 wish to be heard in connection with this motion? Ms. Pierro,
21 do you wish to respond to Mr. Foley?

22 MS. PIERRO: With regard to the stub rent issue, I
23 just wanted to clarify again that the Mesquite lease is a pay
24 in advance lease; however, the tax bill as a whole was received
25 post-petition and that's why December was paid, as well. So, I

1 think again we are dealing with that particular 20-day period.
2 I just wanted to clarify that for the Court. But, other than
3 that, unless the Court has additional questions, I have nothing
4 further.

5 THE COURT: All right. Thank you. All right, the
6 Court is going to deny the motion for adequate protection with
7 regard to the payment of the 2009 taxes. I think that would be
8 granting an administrative super priority, which the Court has
9 previously indicated it would not do. I find no basis for that
10 in the bankruptcy code and so -- but that's without prejudice
11 to the landlord's filing administrative claims at the
12 appropriate time for these and they can be brought up in the
13 claims process if these facilities are, in fact -- the leases
14 are rejected.

15 With regard to the payment of the taxes for November
16 10 through November 30, the -- I think there is a factual
17 dispute. Mr. Foley says that it is an advance payment and that
18 these were due as part of the rent. Ms. Pierro says that they
19 are due when the tax bill is submitted, which would be put in
20 the post-petition period. And I think I need to look at the
21 lease and make that determination. Is the lease one of the
22 exhibits to your motion, Ms. Pierro?

23 MS. PIERRO: I don't believe so, Your Honor.

24 THE COURT: Do you have a copy of the lease that you
25 can submit to the Court?

1 MS. PIERRO: I can make that available once I get
2 back.

3 THE COURT: All right. If you would submit a copy of
4 the lease and the Court will review the lease and make a
5 decision regarding the payment.

6 MR. FOLEY: Thank you. That concludes the items that
7 are on the agenda for today.

8 THE COURT: Okay. Is there any other business we
9 need to take up then this morning?

10 MR. FOLEY: There is not, Your Honor.

11 THE COURT: All right. I was going to say we don't
12 want to wish for more snow coming forward, but obviously it's
13 had a good impact on today's docket.

14 * * * * *

15 C E R T I F I C A T I O N

16 I, LYNN SCHMITZ, court approved transcriber,
17 certify that the foregoing is a correct transcript from
18 the official electronic sound recording of the proceedings
19 in the above-entitled matter.

20 /s/ Lynn Schmitz Date: March 26, 2009

21 LYNN SCHMITZ

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